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NTSB Order No. EA-3739

UNITED STATES OF AMERICA  
**NATIONAL TRANSPORTATION SAFETY BOARD**  
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 19th day of November, 1992

_____	)	
THOMAS C. RICHARDS,	)	
Administrator,	)	
Federal Aviation Administration,	)	
	)	
Complainant,	)	
	)	Docket SE-10306
v.	)	
	)	
JOHN L. HAMMERSTRAND,	)	
	)	
Respondent.	)	
_____	)	

**OPINION AND ORDER**

Respondent has appealed from the oral initial decision of Administrative Law Judge Jerrell R. Davis, issued on May 23, 1990, following an evidentiary hearing.<sup>1</sup> The law judge affirmed an order of the Administrator suspending respondent's airline transport pilot certificate for 180 days. We deny the appeal.

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<sup>1</sup>The initial decision, an excerpt from the hearing transcript, is attached. The law judge did not relate his findings to particular claimed violations. We have done so in this decision.

The Administrator's order was prompted by an October 22, 1988 flight for which respondent was pilot-in-command. Investigation of this flight by the FAA led to charges that respondent violated 14 C.F.R. 43.3(a), 43.13(b), 91.29(a) and (b), 91.33(a), 91.165, and 91.9.<sup>2</sup>

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<sup>2</sup>The provisions read as follows (Part 91 sections have since been renumbered):

§ 43.3(a) Except as provided in this section and § 43.17, no person may maintain, rebuild, alter, or perform preventive maintenance on an aircraft, airframe, aircraft engine, propeller, appliance, or component part to which this part applies . . . .

§ 43.13(b) Each person maintaining or altering, or performing preventive maintenance, shall do that work in such a manner and use materials of such a quality, that the condition of the aircraft, airframe, aircraft engine, propeller, or appliance worked on will be at least equal to its original or properly altered condition (with regard to aerodynamic function, structural strength, resistance to vibration, and other qualities affecting airworthiness).

§ 91.29(a) No person may operate a civil aircraft unless it is in an airworthy condition.

(b) The pilot in command of a civil aircraft is responsible for determining whether that aircraft is in condition for safe flight. The pilot in command shall discontinue the flight when unairworthy mechanical, electrical, or structural conditions occur.

§ 91.33(a) General. Except as provided in paragraphs (c)(3) and (e) of this section, no person may operate a powered civil aircraft with a standard category U.S. airworthiness certificate in any operation described in paragraphs (b) through (f) of this section unless that aircraft contains the instruments and equipment specified in those paragraphs (or FAA-approved equivalents) for that type of operation, and those instruments and items of equipment are in operable condition.

§ 91.165 Maintenance required.

Each owner or operator of an aircraft -

(a) Shall have that aircraft inspected as prescribed in Subpart E of this part and shall between required inspections,

It is undisputed that respondent, carrying five passengers, departed Gillespie Field (San Diego), CA, with an Instrument Flight Rules (IFR) clearance. Once above the clouds, he proceeded on a Visual Flight Rules (VFR) flight. On the return trip from Laughlin, AZ to Gillespie Field, respondent made an intermediate landing at Borrega Valley Airport, CA, after both engines quit in flight and he was able to restart only the front one. Respondent admitted at the hearing that, on the outbound flight, he told a passenger that the fuel system appeared to be feeding improperly (Tr. at 17), yet he nevertheless undertook the return flight with no check of the aircraft. FAA personnel were coincidentally at Borrega when or shortly after respondent landed there. They became involved in discussing the incident, and noticed other discrepancies in the aircraft. Each of the claimed

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except as provided in paragraph (c) of this section, have discrepancies repaired as prescribed in part 43 of this chapter;

(b) Shall ensure that maintenance personnel make appropriate entries in the aircraft maintenance records indicating the aircraft has been approved for return to service;

(c) Shall have any inoperative instrument or item of equipment, permitted to be inoperative by § 91.213(d)(2) of this part, repaired, replaced, removed, or inspected at the next required inspection; and

(d) When listed discrepancies include inoperative instruments or equipment, shall ensure that a placard has been installed as required by § 43.11 of this chapter.

#### § 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

violations is addressed below.<sup>3</sup>

1. Positioning of the turn coordinator/slip skid indicator.

In his complaint, the Administrator alleged that respondent, who was not licensed as a mechanic at the time, performed maintenance on the aircraft by "removing, reinstalling and again removing the turn coordinator/slip skid indicator" (TC) and that the last removal was just before the return flight from Laughlin.

Respondent admitted these allegations (Tr. at 19-20), and the law judge sustained the complaint in this regard.

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<sup>3</sup>We reject respondent's procedural allegations. "Miranda" warnings are not applicable to these, civil proceedings. Respondent had available, but did not use, the Aviation Safety Reporting Program, by which he could seek to avoid a suspension penalty through timely reporting of the incident. Likewise, respondent is incorrect in arguing that, because the FAA has no rule specifically providing for certificate suspension, it may not take such action. The FAA's authority comes directly from Section 609 of the Federal Aviation Act.

Respondent's procedural difficulties with the development of evidence and the conduct of the hearing stem from his unfamiliarity with the Board's rules and basic legal processes. The FAA is not required to provide respondent with relevant investigation results absent a discovery request, and a Freedom of Information Act request for FAA documents must be forwarded to the FAA, not this Board, as the sought documents are not in our possession.

We also see no bias or impropriety in the law judge's handling of the hearing. Although the Board extends considerable latitude to pro se respondents, it is not our duty to ensure that they are fully prepared for the hearing. Administrator v. Smith, NTSB Order EA-3558 (1992) slip op. at 2-3. Thus, for example, it was respondent's (not the FAA's) responsibility to present evidence in respondent's favor and, at the hearing, offer witnesses (or depositions of witnesses) to support his testimony.

The law judge gave respondent a full explanation of hearing procedures (see, e.g., Tr. at 24-31), and extended him considerably more leeway than was required for a fair hearing. Finally, respondent's misunderstanding of the law judge's direction concerning surrender of his certificate (Tr. at 324) is now moot.

In his appeal, respondent states that, although he had thought that he, as a mechanic apprentice and owner of the aircraft, could lawfully remove and install this instrument, he later learned he could not do so. He also inconsistently argues that the rules permit him undertake this work.

Respondent has not satisfactorily rebutted the testimony of the Administrator's witness (Tr. at 95-96) that removing this particular piece of equipment is not preventive maintenance respondent is allowed to perform. Respondent's generalized citations to various rules are inadequate to overcome the record made before the law judge, and we see nothing in the rules themselves (see especially the Part 43 Appendix A (a) listing of authorized preventive maintenance) that would support respondent's belief. Thus, the preponderance of the evidence on this point indicates that respondent violated §§ 43.3(a) and .13(b).

The Administrator also charged that, when respondent removed this instrument from the panel, he permitted it to drop back behind the panel, where it was left resting on electrical wiring.

The Administrator offered photographs taken sometime after the incident that allegedly showed the instrument in that position, and introduced testimony to show that the aircraft was unairworthy (unsafe) as a result. According to the Administrator's witness, respondent had advised the FAA that, at the time the photos were taken, the instrument panel was configured just as it was at the time of the incident. Tr. at

98, 104, and 109.

At the hearing, respondent offered a different version of events. He testified that the TC had been loose, and on the outbound flight he had installed it with mismatched screws. On the return flight, when it would not be needed, he removed it entirely and placed it on a seat in the aircraft. Respondent further testified that, later on, it was reinstalled and placed on the wire bundles. Tr. at 217. To indicate his displeasure with the FAA's continuing investigation, he wanted "to make a violation out of it." Tr. at 220.

The law judge accepted the Administrator's evidence, implicitly finding respondent's explanation incredible. Respondent offers nothing new on appeal that would justify reversing the law judge's finding, and we do not find his inherent credibility conclusion to be arbitrary or capricious. Respondent's statement, in his appeal, that the instrument panel configuration precludes the TC from resting on electrical wiring is new evidence that may not be considered at this stage of the proceeding. More importantly, it is inconsistent with his above-noted testimony at the hearing.<sup>4</sup> The evidence in this regard supports findings that respondent violated §§ 91.29(a) and (b), 91.165, and 91.9.<sup>5</sup>

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<sup>4</sup>He testified: "If the FAA wanted a violation, I'll give them a violation . . . . I'll put the turn coordinator down there on the wires." Tr. at 217.

<sup>5</sup>In this case, the § 91.9 claim could stand alone (see discussion infra) or be considered a "residual" violation. See, e.g., Administrator v. Pritchett, NTSB Order EA-3271 (1991) at

2. Absence of an installed clock. The Administrator charged that respondent operated the aircraft under IFR when he did not have the required clock installed in the instrument panel. The law judge agreed, rejecting respondent's arguments that a passenger had a watch with the same required functions (hours, minutes, and seconds), another instrument in the aircraft could substitute for the clock, and the weather was VFR.

On appeal, respondent repeats the last claim, noting correctly that VFR operations do not require the clock. Respondent continues to ignore, however, the fact that the regulation requires the installed clock whenever IFR operations are conducted, and the record demonstrates that respondent obtained and used an IFR clearance when he left Gillespie Field.

Tr. at 35-36, 114.<sup>6</sup> Whether respondent actually needed such a clearance is immaterial to the §§ 91.33(a) and 91.165 violations, as are the weather conditions at the time.<sup>7</sup> Moreover, there is un rebutted evidence that the absence of the clock made the

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fn. 17, and cases cited there (a violation of an operational FAR regulation is sufficient to support a finding of a "residual" or "derivative" § 91.9 violation).

It is not clear from the record whether the condition of the TC violated § 91.33(a) as well. We need not decide this question, as that violation is otherwise established. See ¶ 2, infra.

<sup>6</sup>See also Tr. at 213-214. Respondent's testimony can be read to admit this point but it is confusing and we do not rely on it.

<sup>7</sup>See Administrator v. Ewing, 1 NTSB 1192, 1194 (1971) ("it is well settled that the Board does not have authority to pass on the reasonableness or validity of FAA regulations").

aircraft unairworthy in violation of § 91.29. Tr. at 51.<sup>8</sup>

3. The engine failure. As noted, respondent admitted to advising a passenger on the outbound flight that the fuel system appeared to be feeding improperly. It is also clear that respondent was operating both engines from the same (right main) tank. After takeoff from Laughlin, the rear engine quit, followed shortly after by the front one. The front engine was restarted, on switching to the left main tank. Respondent was unable to restart the rear engine in flight. Upon landing at Borrego, it was determined that the rear engine quit due to lack of fuel; it also started when its fuel supply was switched from the right to left tank. Tr. at 129. On the ground, the right tank gauge read empty.

We must admit to considerable difficulty in understanding respondent's explanations for the cause of the engine failures and the extent of his responsibility and involvement. At the hearing, respondent seemed to argue that the front engine quit because the student pilot/passenger hit the wrong button when he was directed, at the time the rear engine quit, to hit the pumps.<sup>9</sup> Regardless, an FAA witness testified that, as both engines were running off the same tank, the front engine could be expected to quit shortly after the rear engine, and for the same

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<sup>8</sup>In connection with the instrumentation issues, respondent offers new evidence in the form of a weight and balance data sheet of some sort. Not only is this prohibited new evidence, it is irrelevant to respondent's case.

<sup>9</sup>The student hit the high pressure pump, which apparently can cause the engine to quit.



reason. Tr. at 160-161. The hearing also developed the fact that respondent, while he tried and failed to restart the rear engine on the auxiliary tank, did not try to start it on the left main tank (which, according to the hearing testimony, is the procedure prescribed in the aircraft's manual). Tr. at 278-279.<sup>10</sup>

Respondent's position regarding the rear engine and his overall management of his fuel supply is considerably more difficult to understand. At the hearing, he appears to have taken the inexplicable position that, because the right fuel gauge was "jumping around" and he had in the past had problems using the reserve tank for the rear engine (Tr. at 214), he would run both engines on the same tank.<sup>11</sup> These (and other) past experiences with this aircraft "fooled him into believing" that he had a fuel supply problem with the transfer valves when he had no such problem. Id. at 215. Elsewhere, he testified that he had thought the aircraft had a crossfeed problem, but that mechanics had told him otherwise (Tr. at 224-227).<sup>12</sup> Moreover, respondent stated that he "felt that there was something wrong

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<sup>10</sup> Respondent's appeal offers new evidence interpreting the directions in the aircraft's manual for restarting the engines. Even if we were to consider this argument (which we will not), we are not convinced by respondent's statements, standing alone, especially given the inconsistencies in his other testimony, that in these circumstances the fuel supply should not have been shifted to the other main tank in an attempt to restart an engine.

<sup>11</sup> Respondent further testifies (inconsistently) that he relied on the fuel gauges (which apparently read, enroute, that the right tank was 3/4 full and the left tank was completely full).

<sup>12</sup> We fail to see what relevance there is in mechanic's

but he didn't know what." Tr. at 221.<sup>13</sup>

In affirming the violations, the law judge found that respondent was aware before departure on the outbound flight that the fuel gauges were unreliable, and that he told a passenger, after landing at Laughlin, that the fuel apparently was feeding improperly.

On appeal, respondent continues to argue that there was nothing wrong with the aircraft. His discussion does not, however, convince us that the law judge erred in his findings. It is respondent's testimony that the right tank gauge was not reliable, and he does not deny the statement he made to his passenger. The aircraft was not airworthy when the fuel gauges were not working properly, and respondent continued to operate the aircraft knowing so. This action violated §§ 91.29, 91.33, and 91.165. Moreover, it was careless at the least. There is no evidence in the record that respondent took any action prior to the flight or at Laughlin to investigate the perceived problem, even such limited action as visually checking fuel levels at Laughlin.

Even were we to assume for purposes of argument that all equipment was actually operating properly, respondent would still be guilty of careless or reckless behavior (in addition to the  
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testimony from 1984.

<sup>13</sup>There is considerable discussion in the transcript and the appeal of other possible causes of the failure, including porting and magneto problems. We need not consider these matters to reach our decision.

violations discussed previously in this opinion). Respondent believed there was a fuel supply problem and his erroneous perception of the problem led him to take actions that jeopardized the passengers' and the public's safety. If the gauges were working properly, there can be no excuse for respondent's allowing both engines to run off one tank until it ran dry. It would appear, instead, that respondent's beliefs as to the condition of the aircraft prevented him from seeing the complications that would result from the course of action he had chosen.

In sum, we affirm the Administrator's order and the law judge's decision in all respects. The engine failure is a symptom of respondent's willingness to take matters into his own hands, without the minimum precautions. We are also concerned that his behavior regarding all three matters raised by the Administrator generally demonstrates an unsafe, cavalier attitude towards maintaining the aircraft in accordance with its type certificate.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. Respondent's appeal is denied;
2. The 180-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.<sup>14</sup>

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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<sup>14</sup>For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).